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No. 141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor,
Respondents.

BRIEF FOR THE PETITIONERS IN REPLY

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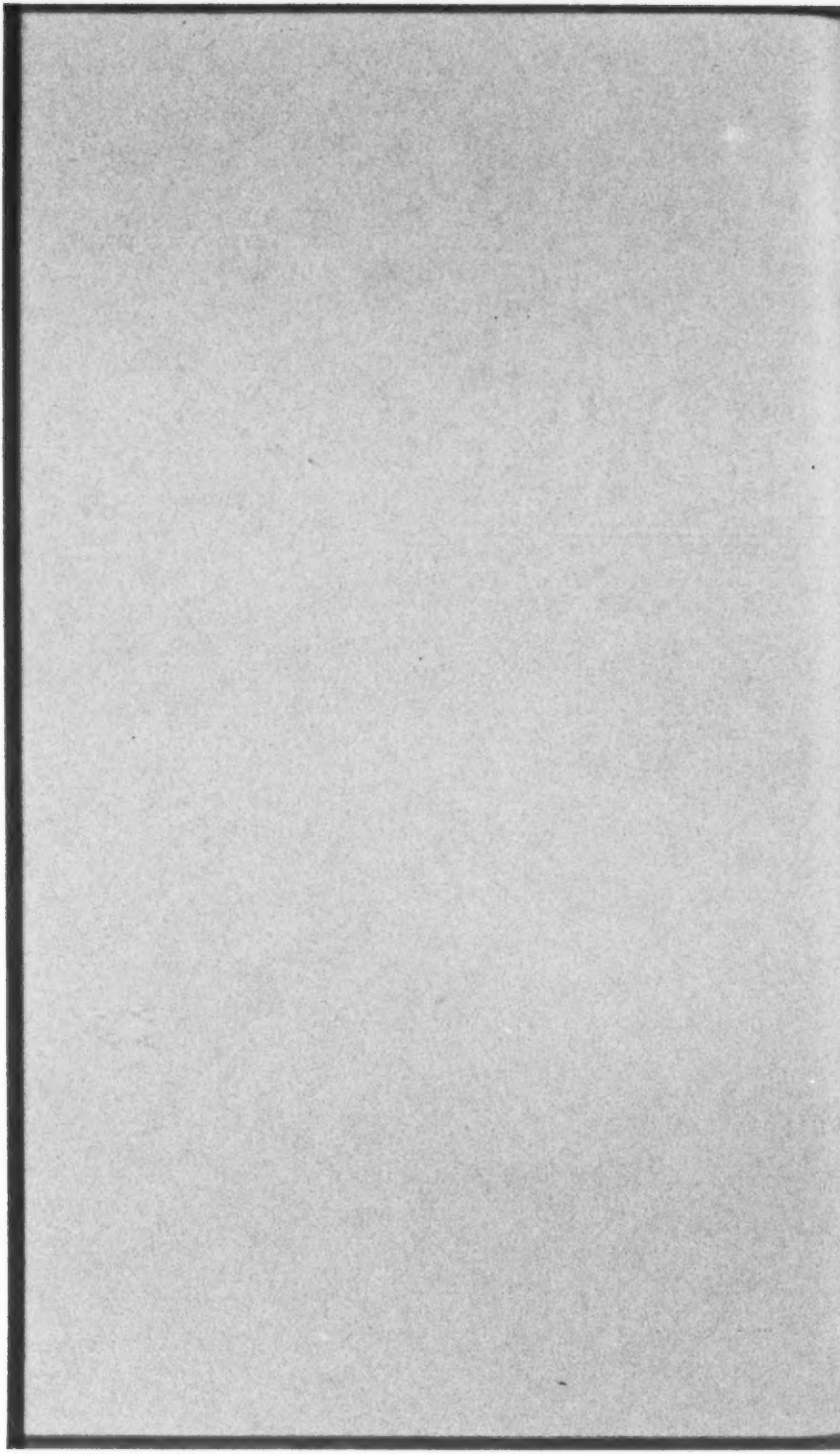
THE ARGUS PRESS, SEATTLE



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BRIEF FOR THE PETITIONERS IN REPLY

ARGUMENT

In view of the respondents' assumptions in their Brief in Opposition, as to the nature of petitioners' treaty rights, we offer, in the interest of clarity, a very short further statement of such rights.

In the treaty of 1855 (12 Stat. 971, Article II) the Quinaielts and the Quilleutes ceded large tracts of land to the United States *and reserved unto themselves* lands to be set aside by executive order. The Quinaielts hold the lands "under their original title" thus reserved within the established boundaries of the Quinaielt Reservation. *U. S. v. Romaine*, 255 Fed. 253, 260. By reason of the title reserved to them-

selves, they have title to the fish in the rivers of the reservation and the federal government has no right to make rules or regulations in regard thereto. *Mason v. Sams*, 5 F. (2d) 255. They have a vested right in the timber on their allotments. *U. S. v. Ferry County*, 24 F. Supp. 399; *U. S. v. Algoma Lumber Co.*, 305 U. S. 415. There is no prohibition as to buying or selling in the treaty of 1855, excepting those found in Article 11 and Article 12, namely to free their slaves and not to purchase or acquire others and not to trade at Vancouver Island or elsewhere outside of the United States. In this respect the treaty of 1855 is a treaty of commerce and is the supreme law of the land. *U. S. v. City of Salamanca*, 27 F. Supp. 541, 543-544. Commerce with the Indian tribes means commerce with the individuals composing those tribes. *U. S. v. Holiday*, 3 Wall. (70 U. S.) 407, 417. The rights under the treaty of 1855 are property rights, and are *vested* in the Indians holding allotments in the Quinaielt Reservation, and the government cannot alter those rights. *Williams v. Johnson*, 239 U. S. 414, 420; *Sizemore v. Brady*, 235 U. S. 441, 449; *Choate v. Trapp*, 224 U. S. 665; *English v. Richardson*, 224 U. S. 680; *Jones v. Meehan*, 175 U. S. 1; *Chase v. United States*, 222 Fed. 593, 596; *Morrow v. United States*, 243 Fed. 854, 856. Citizenship to the Indian does not destroy those rights. 43 Stat. 253, 8 U. S. C. §3. The Quinaielt Treaty having been made prior to March 3, 1871, it shall not be impaired by Congress. 16 Stat. 566. 25 U. S. C. §71. *Taylor v. U. S.*, 44 F. (2d) 531. While Congress may ordinarily pass stat-

utes affecting treaties in some particulars, it cannot disturb property rights of Indians where those rights have already vested under a treaty. *Sizemore v. Brady*, 235 U. S. 441, 450; *Choate v. Trapp*, 224 U. S. 665, 671. Thus any statute or any rule or regulation that takes away or holds back or reduces the amount or makes any charges in the holding or in the selling of the timber in the Quinaielt Reservation in the hands of individual allottees or their heirs is invalid and runs counter to the federal constitution.

The government admits that it has left uncut and unsold under sales contracts, as examples, R. 811, (a) to the extent of 40% of $2797.00; (b) to the extent of $5000.00; (c) to the extent of $4500.00; (d) to the extent of $3571.47 from 30 acres and 50 acres not touched; (e) to the extent of $1200.00; (f) to the extent of twice the $1003.44, and others, including (g) R. 1011, 40% left standing on the area logged, resulting in a 20% blowdown in three years of the part left standing, with no compensation paid in any instance.

With this clarifying background, we now reply specifically to respondents' argument.

1. The respondents (Respondents' Brief p. 7) challenge our point that there was no basis for the insertion of restrictions against alienation in the patents given to the Quinaielt Indians not residing on the Reservation. This point is important for the purpose of determining whether the provisions of Section 8 of the Act of June 25, 1910 (25 U. S. C. §406) are applicable inasmuch as the section provides that "the timber on any Indian allotment sold under a trust or

other patent containing restrictions on alienation, may be sold by the Indian allottee."

Our first point is that by reason of the Treaty of 1855 and the special Act of March 4, 1911 (36 Stat. 1345, 1346) under which the present Quinaielt allotments were made to the non-resident Indians, no such restriction is applicable.

Under the Treaty of 1855 it is only in the case where the allotment is for permanent home on the Reservation that the President can impose the condition that the land shall not be aliened. Where allotments of reservation lands are made to these Indians who have never resided on the Reservation, the treaty restraint on alienation does not reply. Allotments were made to the Quinaielt Tribes under the special Act of March 4, 1911 (36 Stat. 1345, 1346). See *Halbert v. U. S.*, 283 U. S. 753; *U. S. v. Payne*, 264 U. S. 446. The special Act of March 4, 1911, under which these Quinaielt allotments were made, invoked the General Allotment Act of February 8, 1887 (25 U. S. C. §§331-348) only so far as the latter Act was applicable in the light of the Treaty and the Act of 1911, because as far as the Quinaielts are concerned the General Allotment Law of 1887 and the Act of March 4, 1911, must be harmonized with the Treaty. *U. S. v. Payne*, 264 U. S. 446.

Thus, while the allotments on the Quinaielt Reservation under the special Act of March 4, 1911, were to be made under the "allotment laws of the United States," it was held in the light of the Treaty and of the special Act of 1911 that the provisions of the residence requirement of Section 1 of the General Allot-

ment Law were not applicable to these Quinaielt allotments. *Halbert v. U. S.*, 283 U. S. 753, 761-2. Nor, because of the Treaty, does the provision of the General Allotment Law confining allotments to lands "advantageous for agricultural and grazing purposes," apply to the Quinaielt allotments made under the Act of 1911. *U. S. v. Payne*, 284 Fed. 827, affirmed 264 U. S. 446. The Ninth Circuit Court of Appeals in *U. S. v. Payne*, 284 Fed. 827, 828, said:

> "The provisions of the treaty contained no restriction as to the character of the land to be located, and we do not regard the provisions of the Act of 1887 [General Allotment Law] *supra*, as so limiting the authority of the President that he may not order allotment of lands included in the reservations made under the treaty provisions and surveyed * * *. Furthermore, judicial knowledge will be taken of the fact that, when the treaty was made, the reservation was in a timbered area of the country."

This Court, in affirming the foregoing decision, followed the Circuit Court of Appeals in its reasoning as follows, 264 U. S. 446, 448:

> "The treaty makes no restriction in respect of the character of the land to be 'assigned'; and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and, *pro tanto*, abrogate, the treaty, is not to be lightly attributed to Congress * * *.
>
> "Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do, *Hauenstein v. Lynham*, 100 U. S. 483, 487, we conclude that the character of the lands there-

after to be set apart for them severally was not restricted."

Consequently the allotments to the Quinaielts under the special Act of 1911 were of all lands on the Reservation regardless of their agricultural or grazing character and even though unsuitable for such purpose, all in accordance with the Treaty, which "makes no restriction in respect of the character of the land to be 'assigned.'" *U. S. v. Payne, supra*, 264 U. S. 446, 448. As previously pointed out, all of the 200,000 acres in the Reservation has been allotted except about 100 acres, and less than 1% is suitable or valuable for any other purpose than as timber land. It is rough and rugged country, suitable for neither agriculture nor grazing.

It is thus plain that Section 5 of the General Allotment Act (24 Stat. 388; 25 U. S. C. §348), just as certain other portions of the General Allotment Act which have been held inapplicable to the Quinaielt Reservation, does not apply to these Quinaielt allotments.

So far as the Treaty is concerned, the President could restrain alienation only where the allotment was for a permanent home. Concededly the very great majority of the allottees have never lived on the Quinaielt Reservation, but under the Act of 1911 were entitled to allotments nevertheless, so far as the Treaty is concerned, without restraint. The allotments to the non-resident Quinaielts under the Act of 1911 involved no domiciliary or home-creating concept. That Act merely intended to divide up among the non-resident members of the Tribes the land that

was left after the few Indians permanently residing on the Reservation had been taken care of. This is shown by the proviso of the 1911 Act, to-wit:

> "Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians *thereon* have been completed."

See *Halbert v. U. S.*, 283 U. S. 753, 758.

Thus Section 5 of the General Allotment Act (25 U. S. C. 348) never applied to these allotments. The 25-year trust patents were to be issued under that section only with respect to "allotments provided for in sections 331 to 334, inclusive, and 336 * * *." These sections relate only to Indians "*located on*" lands which may "be advantageously utilized for agricultural or grazing purposes by the Indians." As pointed out, and held by this Court, this had never been the situation in the case of allotments on the Quinaielt Reservation under the special Quinaielt Allotment Act of 1911, under which, as construed by this Court, there is (1) no residence requirement, and (2) in the light of the treaty, "no restriction in respect of the character of the land assigned."

In the light of the Treaty, therefore, and the Act of 1911, under which these Quinaielt allotments are made, these allotments are free of any lawful restraint on alienation, because the Secretary had no legal authority to insert any restraints in patents caused to be issued by him under the special Quinaielt Allotment Act of 1911. The power of the Secretary of the Interior to impose restrictions on the alienation of property by an Indian under Section 5 of the Gen-

eral Allotment Act is statutory only, *U. S. v. Watasche*, 21 F. Supp. 903, affirmed 102 F. (2d) 428, and can only be exercised where there is a clear statutory ground. Section 5 furnishes no such authority as to the Quinaielt allotments. The Secretary was only authorized to issue trust patents containing a restraint on alienation with respect to Indians "located on" allotted lands "which may be advantageously utilized for agricultural or grazing purposes by the Indians." The Quinaielt allotments not being so limited either as to residence or the character of the land allotted, Section 5 has no application, and therefore the Secretary had no authority under that section to cause restraints on alienation to be inserted in the patents issued to the non-resident Quinaielt allottees. These Quinaielt allottees, under the special Act of 1911, were entitled to trust patents not containing any restraints, and for complete want of power in the Secretary, the issued patents of petitioners must be so construed.

This being true, Section 8 of the Act of June 25, 1910 (25 U. S. C. §406) is inapplicable because the Quinaielt trust patents do not contain a valid restraint on alienation, and therefore the Indians are free to contract for the sale of the timber thereon without the consent of the Secretary.

2. But if we assume that the Quinaielt patents under the special act of 1911 do contain a valid restraint on alienation and that Section 8 of the Act of June 25, 1910 (25 U. S. C. §406) is therefore applicable, the result is the same.

Before the Act of 1910, the Act of February 16, 1889 (25 Stat. 673; 25 U. S. C. §196; see also 25 U. S. C. §155) had given the President authority, under such regulations as he might prescribe, to authorize the Indians on reservations or allotments to sell *dead* timber, standing or fallen, on such reservations. *U. S. v. Algoma Lumber Co.*, 305 U. S. 415, 422.

In *U. S. v. Paine Lumber Co.* (1907) 206 U. S. 467, this Court held that a restraint on alienation respecting an Indian allotment did not prevent the Indians, even without the approval of the Secretary of the Interior, from lawfully selling live timber off their allotments, where the land was arable, and of no use as agricultural land until the timber was cut; that the restraint on alienation applicable to the land under the trust patents should not be exaggerated, and should not be applied to the timber under such circumstances.

In *Starr v. Campbell* (1908) 208 U. S. 507, however, it was held, distinguishing the case just cited, that where the allotted land was valuable primarily as timber land, and of little value for any other purpose, the restraint on alienation extends to the timber as well as the land; and also that the President could control the distribution of the proceeds of the timber sale for the benefit of the Indian.

As a consequence, at least in part, of this later decision, Congress passed the Act of 1910, a comprehensive act dealing with Indian problems; and in Sections 7 and 8 (36 Stat. 855, 857; 25 U. S. C. §§406, 407), Congress carefully covered the sale of living timber on both *allotted* and *unallotted* Indian lands in

two separate and distinct sections. As to *unallotted* lands it provided in Section 7 that the mature living, dead and down timber "may be sold *under regulations* to be prescribed by the Secretary of the Interior, and the *proceeds* of such sales shall be used for the benefit of the Indians of the reservation in such manner as he shall see fit." And as to *allotted* lands, such as involved in this case, Congress provided in Section 8 that the timber "may be sold by the *allottee* with the *consent* of the Secretary of the Interior, and the *proceeds* thereof shall be paid to the allottee or disposed of for his benefit under *regulations* to be prescribed by the Secretary of the Interior." In both sections Congress carefully embraced (1) the right to sell the timber and (2) the disposition of the proceeds for the benefit of the Indians, thus covering both questions raised in *Starr v. Campbell*, removing the restriction of that decision on the allottee's right to sell timber, and requiring only the Secretary's consent, but protecting the Indian fully as to the use and expenditure of the proceeds.

The right to sell was given by Congress to the "allottee." The "allottee" is the Indian to whom an "allotment" is made, and not his heirs (*Parkinson v. Skelton*, 33 Okla. 813, 128 Pac. 131, 132; *Lynch v. Franklin*, 37 Okla. 60, 130 Pac. 599, 600, affirmed 233 U. S. 269). Whatever the Secretary or the Ninth Circuit Court of Appeals may think of the desirability of protecting the heirs and descendants of the allottee through the experimental technique of selective logging, the fact remains that Congress conferred the

right to sell the timber on the *allottee* himself. The allottee's power of sale so conferred by Congress includes the right to fix the terms and conditions of sale. The Secretary has the right to approve or reject the conditions of sale arrived at between the allottee and the other contracting party, but he can make "regulations," in the case of *allotted* lands, only as to the *proceeds* of the sale. Here he has attempted, in the case of timber on allotted lands, also to make "regulations" as to the terms of sale—a power not conferred by Congress, and by necessary implication denied. *Expressio unius est exclusio alterius. U. S. v. Arredonda,* 6 Pet. 691, 725; *Botany Worsted Mills v. U. S.,* 278 U. S. 282, 289. In the case of timber on allotted lands, in the light of the history of Indian timber sales, Congress intended the Secretary to have a veto power, no more, and to have control of the distribution of the proceeds of the sale to the Indian for the latter's own good.

The argument (Resp. Br. p. 10) that the departmental construction for thirty years has considered that there is no difference in the Secretary's power as respects allotted and unallotted reservation lands, in the face of a clear and explicit statute admitting of no construction, can have no weight. Such administrative construction can be taken into account only when the statutes are open to doubt, not where they are clear as here. *U. S. v. Missouri Pac. R. Co.,* 278 U. S. 269, 280; *Burnet v. Chicago Portrait Co.,* 285 U. S. 1.

And in no event is the court bound by an administrative construction. *U. S. v. Missouri Pac. R. Co.,*

278 U. S. 269, 280; *Burnet v. Chicago Portrait Co*, 285 U. S. 1.

Moreover, as respects the so-called selective logging regulations generally, respondents admit (Resp. Br. p. 5) that before 1936 these regulations were not enforced, and hence their lawful application has only recently become justiciable, and hence any administrative construction with respect to them can bind nobody. It is not characteristic of administrative officials to construe their powers narrowly, but it is the function of the courts to protect the individual, especially the Indian, whose affairs are directly administered by Government officials, from excesses of administrative zeal, and this Court has often done so.

Respondents suggest (Resp. Br. p. 10) that the decision of the court below is not in conflict with *U. S. v. Algoma Lumber Co.*, 305 U. S. 415. It seems to us that counsel avoid our point under that case. In that decision the court specifically held that the contracts for the sale of timber on allotted Indian lands were contracts between the *Indian allottee* and the other contracting party, and that the Government was not a party to these contracts. This court said, 305 U. S. 415, 422, 423:

> "The contracts authorized were to be those of the Indians and not of the United States.
>
> * * * * * * *
>
> "As the Court of Claims found that the contracts for the sale of timber on allotted lands were entered into *by individual allottees as prescribed by §8 of the Act of 1910*, they stand on no different footing, as obligations of the United

States, from the tribal contract or similar contracts entered into under the Act of 1889. (Italics ours)

"Since none of the contracts in suit were contracts or obligations of the United States * * *."

This point was squarely before the court and was expressly decided. Now if, as held in that case, the contract for the sale of timber is that of the Indian allottee and not of the United States, then the Indian allottee has the right to fix the terms and conditions of sale, because Congress gave the power of sale to him and not to the Secretary. The Secretary is merely given, by Congress, a veto power over the contract, to be sure that the Indian realizes an adequate return from the contract, and the right to disburse the proceeds to the Indian allottee in his discretion. It was never the intent of Congress that the Secretary should withhold his consent unreasonably and nullify the allottee's right to sell timber.

We also respectfully submit that counsel gloss over our next very important point under *U. S. v. Shoshone Tribe*, 304 U. S. 111, 116-17, and *Chippewa Indians v. U. S.*, 301 U. S. 358, 375-6. The first case holds, as do many other decisions of this court, that the Indians are the substantial owners of the reservation lands and the timber thereon, and not the United States, even though the latter holds the naked legal title in trust; and the second case holds that the power of the Government to manage Indian lands "is subject to constitutional limitations and does not enable the Government * * * to deal with them as its own."

The Government can undoubtedly, as to its *own*

timber lands, put into effect so-called selective cutting regulations withholding 25% to 60% of the timber from sale; but to attempt to impose such regulations on timber belonging to the Indians raises serious questions of constitutional right under the Fifth Amendment and nullifies the power of sale conferred on the allottee by Congress.

Moreover, we again point to certain of the regulations of the Secretary here under attack (R. 360-361, 403), setting forth their purposes:

> "The preservation of the forest for scenic purposes along public highways, in the vicinity of Indian or white communities, and wherever the recreational or aesthetic value of the forest seems to exceed its value for the production of forest products."
>
> "* * * A strip not exceeding 300 feet in width on each side of streams, roads and trails, and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed * * *."

We say that these regulations violate the Quinaielt Treaty as to just compensation, and the Fifth Amendment, and that they cannot be justified on any basis. The Government can doubtless pursue such a policy with reference to its own lands, but it cannot do so with regard to the land of others without paying just compensation. If the Government desires to pursue such a policy on the Quinaielt Reservation for aesthetic, recreational and conservational purposes there is nothing to prevent the Government from doing so by making the necessary payment to the Indians, but without paying such compensation as provided by the

Treaty and the Fifth Amendment it can no more enforce such a confiscatory regulation than it could deny to any member of this Court, without paying just compensation, the right to cut his own timber along roads and streams on his private property because in the opinion of the Secretary "the recreational or aesthetic value of the forest seems to exceed its value for the production of forest products."

The regulations under attack amount to the Government's treating the Indian lands as belonging to the Government instead of to the Indians. Such a confiscatory policy cannot be constitutionally enforced on private persons, including Indians, without the payment of just compensation. Otherwise, we respectfully submit, the Quinaielt Treaty and the Fifth Amendment have become meaningless. If, as suggested by the respondents and the court below, the court on this point is "not at liberty to substitute its judgment for that of the Secretary" on a matter of *law* arising under a Treaty and the Constitution, then the judicial protection of Treaty and constitutional rights, and government by law instead of by men, have disappeared.

We cannot accept the view that the Secretary is the final arbiter of Treaty and constitutional rights without an earnest appeal to this Court for review and relief from the doctrine that the Secretary's views of aesthetic, recreational and conservational values justify the confiscation of private property without compensation.

We sincerely believe that the officials of the Department of the Interior would be the first to invoke

the Constitution and all the precedents of this Court if such doctrine were applied to them, and any timber lands privately held by them.

We respectfully submit that the regulations withholding from sale vast areas along roads, trails and streams, and camping grounds and recreation grounds, for aesthetic, scenic and recreational purposes, amounts to an appropriation by the Federal Government of Indian property for public use, without providing for the payment of just compensation, in violation of the Treaty and the Fifth Amendment; and that these regulations are, therefore, invalid. We feel certain that Congress never conferred on the Secretary the power to make such confiscatory and illegal regulations.

3. The Act of February 14, 1920 (41 Stat. 415; 25 U. S. C. §413), as amended in 1933 (47 Stat. 1417), provides that the Secretary of the Interior is authorized in his discretion, under such "rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue." Under this statute respondents seek to sustain the regulation authorizing a deduction of 8% from the gross proceeds of timber sales, to cover the cost of advertising and supervising the sales.

Our point is that this is a general Act and is not to be construed as abrogating a prior specific treaty in which the Government agreed to pay the expenses of Government employees. *Rogers v. U. S.*, 185 U. S. 83,

87-8; *U. S. v. Nix*, 189 U. S. 199, 205; *Washington v. Miller*, 235 U. S. 422, 427-8; *Baltimore National Bank v. Tax Commission*, 297 U. S. 209, 215. We could freely admit that a narrow construction of the treaty right in the Quinaielt Treaty of 1855 might support the view of the respondents and of the court below, but we suggest that that liberal construction in favor of the Indians, "the enlarged rules of construction" applied "in the sense in which they would naturally be understood by the Indians," which this Court has always said must be adopted in interpreting Indian treaties, supports the result for which we contend as to these Quinaielt Indians. *U. S. v. Payne*, 264 U. S. 446.

In *U. S. v. Payne*, 264 U. S. 446, this Court, speaking of the Quinaielts, said (p. 448):

> "These Indians yielded whatever claims they may have had to a valuable and extensive area in exchange for a relatively small reservation * * *. They are an unlettered people, unskilled in the use of language * * *. Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do, *Hauenstein v. Lynham*, 100 U. S. 483, 487, we conclude that the character of the lands thereafter to be set apart for them severally was not restricted."

In *Halbert v. U. S.*, 283 U. S. 753, 760, again speaking of the Quinaielt Indians, this Court said:

> "As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land."

In the light of these considerations it seems to us that the special treaty should be construed as exempt-

ing the Quinaielt Indians from paying a fee to the Government for supervision of their timber lands by Government employees, and that the Act of February 14, 1920, as amended in 1933, being general, should not be construed to override the specific treaty, but to leave it in full force and effect.

Otherwise, the Government is in the uneviable position, after having taken from these Indians "a valuable and extensive area in exchange for a relatively small reservation," which was reserved to them "under their original title" of taking also a substantial percentage of the sale price of the Indians' property for supervision by Government officials—a taking of private property to which the Indians have not given their consent. It in fact amounts to a destruction or recapture of a part of the consideration originally given by the Government in the treaty in exchange for the cession by the Indians of their large and valuable rights and is in that sense a breach of the treaty —a result at all cost to be avoided if possible. It must be borne in mind that the regulations taking a part of the sale price of the Indians' property are made without the consent of the Indians, and in diminution of the vested rights conferred by the treaty, which are protected by the due process and just compensation clauses of the Fifth Amendment of the Federal Constitution. We think in this case the specific treaty, as against the general statute, can be construed to avoid this result, and respectfully urge this result be avoided.

CONCLUSION

The sole problem before this Court at this time is whether review should be granted of this cause.

We respectfully point out the fact that the propriety of these important regulations concerning the logging of Indian lands is for the first time presented to this Court; that the decision below affects the rights of thousands of Indians holding allotted timber lands; that many thousands of dollars worth of Indian timber is affected; that important treaty, constitutional and statutory rights of Indians are involved; that the true effect of very recent decisions of this Court requires consideration; and that the will of Congress, plainly expressed, concerning wards of the Government, is called into question.

In *U. S. v. Algoma Lumber Company*, 305 U. S. 415, 418, this Court granted certiorari, "the questions involved being of public importance in the administration by the United States of Indian lands * * *."

We respectfully submit that this is likewise such a case, and earnestly pray that the petition for certiorari may be granted.

Respectfully submitted,

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